Top Job Building Maintenance Co., Inc. *and* Local 254, Service Employees International Union, AFL–CIO. Case 1–CA–28104

January 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge filed by the Union on March 14, 1991, the General Counsel of the National Labor Relations Board issued a complaint on April 25, 1991, against Top Job Building Maintenance Co., Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed an answer to the complaint.

On October 1, 1991, the General Counsel filed a motion to transfer proceeding to the Board, to strike portions of Respondent's answer, and for summary judgment. On October 3, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The General Counsel contends that the portions of the Respondent's answer responding to complaint allegations 3(a) and (b), 4, 5, 6, 7, 9, and 13 through 18 are insufficient answers under Section 102.20 of the Board's Rules and Regulations.[1] Section 102.20 of the Board's Rules and Regulations provides as follows:

> The respondent shall, within 14 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The Respondent answers most of the complaint allegations by asserting that it is no longer in business and that it does not have the financial means to bargain. Additionally, regarding the complaint paragraphs alleging that the Respondent is engaged in commerce, the Respondent in its answer asserts that it is no longer in business and that its services for certain customers cited in the complaint have been terminated; regarding complaint paragraph 9 which alleges that the Union is the employees' collective-bargaining representative, the Respondent in its answer states that "[b]argaining was to take place;" and regarding complaint paragraph 13 which alleges that the Respondent failed to notify and engage in effects bargaining with the Union, the Respondent in its answer states that it has "not yet bargained or agreed to terms of the [u]nion."

We agree with the General Counsel that the Respondent's answer does not constitute a proper answer under Section 102.20 of the Board's Rules and Regulations because it does not specifically admit, deny, or explain each of the allegations in the complaint, except insofar as it contends that its actions were a result of its economic circumstances.[2] It has been established, however, that economic necessity is not cognizable as a defense to an allegation of an unlawful refusal to bargain. *Auburn Die Co.*, 282 NLRB 1044 (1987); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973). Moreover, regarding the Respondent's answer to the complaint paragraph alleging jurisdiction, we note that the Board has found no merit to the argument that because an employer has ceased operations during the period when the unfair labor practices were alleged to have occurred it was not engaged in commerce at that time. *Pacific Consolidated*, 286 NLRB 1102 (1987). Further, the Respondent's answers to complaint paragraphs 9 and 13, described above, are not responsive to the complaint allegations.

Although there is no paragraph 19 in the complaint, the Respondent includes in its answer the following paragraph labeled "19," presumably as an affirmative defense: "There is nothing to meet over, the respondent is no longer in business, the respondent expects to file bankruptcy, both personal and corporate, within the next 45 days." We note, in agreement with the General Counsel, that it is well settled that a respondent's filing of a bankruptcy petition does not prevent the Board

[1] The Respondent in its answer admits the allegations in pars. 1, 2, 8, 10, 11, and 12 of the complaint.

[2] See, e.g., *Thames Valley Steel Corp.*, 305 NLRB No. 87 (Nov. 22, 1991); and *McIntyre Engineering Co.*, 293 NLRB 716, 717 (1989). In Member Oviatt's view there are limited circumstances, not present here, in which an employer may defend 8(a)(5) allegations based on its economic circumstances. See his dissent in *Zimmerman Painting & Decorating*, 302 NLRB No. 135 (May 9, 1991).

from hearing and determining an unfair labor practice case to its final disposition. *Decorative Coverings*, 302 NLRB No. 79 (Apr. 11, 1991), and 302 NLRB No. 80 (Apr. 11, 1991). We find, therefore, that the Respondent's claim provides no defense to its alleged unlawful actions.

Accordingly, in view of the Respondent's failure to file an answer that comports with the Board's rules, and in the absence of good cause being shown for the failure to file a proper answer, we grant the General Counsel's Motion for Summary Judgment.[3] On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in New Bedford, Massachusetts, had been engaged in the business of furnishing contract cleaning services. The Respondent, annually, in the course and conduct of its business operations, provided services valued in excess of $50,000 to Spaulding & Slye, Inc., Codman & Shurtleff, and Polaroid Corporation, all business enterprises located in Massachusetts and directly engaged in interstate commerce. The Respondent, annually, in the course and conduct of its business operations, purchased and received goods, supplies, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at Respondent's 565 Technology Square, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical employees, foremen and all other supervisors as defined in the Act.
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> (b) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 575 Technology Square, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical emloyees, foremen and all other supervisors as defined in the Act.
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> (c) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 38 Henry Street, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical employees, foremen and all other supervisors as defined in the Act.
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> (d) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 21 Osborn Street, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical employees, foremen and all other supervisors as defined in the Act.

On or about October 11, 1988, the Respondent by letter voluntarily recognized the Union as the exclusive collective-bargaining representative of the employees in the units. Since about October 11, 1988, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Prior to mid-February 1991, and at all times material, the employees in the units had been employed by the Respondent and had, pursuant to a contract between the Respondent and Polaroid Corporation, provided cleaning services to the Polaroid Corporation at the locations described above. On or about January 11, 1991, the Respondent notified Polaroid Corporation that it was terminating the contract described above in 30 days. In

[3] The General Counsel contends that the Respondent's answer in response to complaint pars. 3(a) and (b), 4, 5, 6, 7, 9, and 13 through 18, and its affirmative defense labeled "19," should be stricken. In light of our granting of the General Counsel's Motion for Summary Judgment, we find it unnecessary to pass on the General Counsel's motion to strike.

about mid-February 1991, the Respondent ceased its business operations and terminated the employees in the units, without giving the Union prior notice and an opportunity to bargain over the effects of such conduct on the units. On or about March 7 and April 2, 1991, the Union requested the Respondent to negotiate concerning the effects of the cessation of its business operations. Since on or about March 7, 1991, the Respondent has failed and refused to meet and negotiate with the Union concerning the effects of the cessation of operations, which relates to wages, hours, and other terms and conditions of employment and is a mandatory subject of bargaining.

We find that by the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively with the Union as the exclusive representative of its employees, and that the Respondent has been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By failing and refusing to bargain with the Union about the effects of its cessation of operations, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent, on request, to bargain with the Union about the effects of its cessation of operations, and we shall accompany the order with a limited backpay requirement designed both to make the employees whole for losses suffered as a result of the Respondent's failure to bargain, and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. Thus, we shall require the Respondent to pay backpay to its employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). We shall order the Respondent to pay the employees in the units backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the cessation of the Respondent's operations on the employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount which the employees would have earned as wages from the date on which the Respondent ceased its operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Interest on all such sums shall be paid in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, in view of the Respondent's cessation of operations, we shall order the Respondent to mail copies of the notice to all employees in the units.

ORDER

The National Labor Relations Board orders that the Respondent, Top Job Building Maintenance Co., Inc., New Bedford, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Local 254, Service Employees International Union, AFL–CIO, about the effects of its cessation of operations on the employees in the following appropriate units:

> (a) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at Respondent's 565 Technology Square, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical employees, foremen and all other supervisors as defined in the Act.
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> (b) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 575 Technology Square, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by an-

other union, but excluding sales employees, office clerical emloyees, foremen and all other supervisors as defined in the Act.

(c) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 38 Henry Street, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical employees, foremen and all other supervisors as defined in the Act.

(d) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 21 Osborn Street, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical employees, foremen and all other supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of its employees in the above-described units about the effects of its cessation of operations, and pay limited backpay to the employees in the units in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(c) Mail a copy of the attached notice marked "Appendix"[4] to the last known addresses of all employees in the units who were employed at the Respondent's locations described above immediately prior to the Respondent's cessation of operations. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYESS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Local 254, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of our employees in the following appropriate units about the effects of our cessation of operations at the locations listed below. The appropriate units are:

(a) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at Respondent's 565 Technology Square, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical employees, foremen and all other supervisors as defined in the Act.

(b) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 575 Technology Square, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical emloyees, foremen and all other supervisors as defined in the Act.

(c) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 38 Henry Street, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office

clerical employees, foremen and all other supervisors as defined in the Act.

(d) All employees who regularly work in excess of 15 hours per week engaged in the contract building cleaning industry at the Respondent's 21 Osborn Street, Cambridge, Massachusetts location, including all janitors, porters, cleaners, doormen, elevator operators, starters, handymen, groundsmen and maintenance tradesmen not represented by another union, but excluding sales employees, office clerical employees, foremen and all other supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union about the effects of our cessation of operations at the above-described locations on the employees in the units, and WE WILL pay employees in the units limited backpay as required by the National Labor Relations Board.

TOP JOB BUILDING MAINTENANCE CO., INC.